No. 48903-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

DIANA GUARDADO
Respondent
v.

OTTO GUARDADO
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAMANIA COUNTY

APPELLANT'S OPENING BRIEF

OTTO GUARDADO
Appellant
10007 NE 28th Ave
Vancouver, WA 98686
360-713-2448

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Rules

Statues

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANA GUARDADO Respondent v. OTTO GUARDADO Appellant	Skamania No. 14-2-00141-1 COA No. 48903-1-II NOTICE OF ERRATA AND CERTIFICATE OF SERVICE

Please note the following errors that were caught after submission of the Appellant's Opening Brief. I apologize for any inconvenience.

Location	Reads	Intended
Table of Authorities, Other Authorities	[Omission]	4 Karl B. Tegland, Washington Practice: Rules Practice § CR 59 authors' cmt. at 31 Motion to alter or amend judgment (2016).....Page 24
Page 17	...whether it was because believed it would...	...whether it was because he believed it would...
Page 18	The court also entered supersedeas bond...	The court also ruled on a supersedeas bond...
Page 19	Otto made multiple motions the Court of Appeals...	Otto made multiple motions in the Court of Appeals...
Page 24	It does not provide that an order may be *amended*, for example, under CR 59(h).	It does not provide that an order may be *amended*, for example, as under CR 59(h).
Page 26	The trial conclustion of law states...	The trial conclusion of law states...

Respectfully submitted November 8, 2016,

s/ Otto Guardado
10007 NE 28th Ave
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CERTIFICATION

I Certify under penalty of perjury in accordance with the laws of the State of Washington that I served Respondent, through her attorney, Thomas Foley, by email at [redacted], the following on October 5, 2016:

Notice of Errata

Dated November 8, 2016 at Vancouver, WA,

Otto Guardado
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I. INTRODUCTION

This case involves two former spouses with a problem common among divorced couples, which resulted in an uncommon outcome. Like many spouses, they purchased a home together, but faced the dilemma about what to do with the joint mortgage when they divorced. In 2008, the parties drafted and agreed to their own dissolution decree without using legal representation. The husband assumed responsibility for the house and the associated mortgage. Like many homes during this time, the house was "upside down" – the value had dropped below the mortgage principal, and would continue this trend for about six more years until the housing market recovered.

The husband missed payments due to the economy. Because of the upside-down position of the mortgage, it was not possible to refinance the mortgage out of the wife's name. During this time, she wanted to buy her own house and alleged that her obligation on the mortgage was holding her back. Bank of America offered to reduce the mortgage principal and payments of the house through a nationwide mortgage modification program, which the parties agreed to. The wife signed a quitclaim deed at this time under the terms of the 2008 dissolution decree, allegedly believing that it would relieve her of the mortgage.

In the ensuing breach of oral contract litigation, she claimed that both husband and Bank of America told her that the modification process will remove her obligation from the mortgage, and that he breached an oral

contract by not relieving her of the obligation. The husband denies he made any contract that that would remove her name from the obligation.

The trial court did not find that the husband breached any contract, but it re-opened and modified the eight-year-old dissolution decree for equitable purposes, reasoning that the hold harmless provision was violated. The court held that because the husband had not removed the wife's obligation (or could not), that it would appoint a special master and a realtor to sell his home within three months. It reasoned that because the parties hadn't foreseen a way for the wife to separate from the mortgage, it would engineer one. By doing this, the court ignores decades of warning about the perils of re-opening dissolution decrees. The trial court made a ruling that is contrary to Washington law, precedent, and policy favoring finality in consent decrees, particularly ones as distant as this one.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the Respondent to modify a consent dissolution decree under CR 60(b)(11) without effectuating the rule's procedures.
2. The trial court erred by modifying a dissolution decree under CR 60(b)(11) when its only application is to vacate a decree.
3. The trial court erred by applying "extraordinary circumstances" under CR 60(b)(11) where no such circumstances existed.

4. The trial court erred when it failed to consider that the doctrine of equitable estoppel prevented the Respondent from bringing action in the first place.
5. The trial court erred when, in the interest of an equitable judgment, it imposed terms and conditions upon a divorce decree that the parties had never discussed or agreed upon.
6. The trial court erred when it performed in camera review of attorney fees and awarded them without regard to reasonableness or the Respondent's unsuccessful theories.
7. The trial court erred by entering the following findings of fact:
    a. "This case arises out of a problem created by the parties when they drafted their divorce decree (hereinafter the "Divorce Decree") *pro se.*" Finding 2.
    b. "In the Divorce Decree, awarding the real property at issue, located at 10007 NE 28th Avenue in Vancouver, WA (hereinafter the "Property"), to the defendant, the parties did not contemplate a remedy for the plaintiff if the defendant fell behind on the mortgage payments due on the Property." Finding 3.
    c. "The Divorce Decree contains a hold harmless provision, stating, in part, "Each party shall hold the other party harmless from any collection action relating to separate or community property liabilities set forth ... " The parties did not contemplate that the hold harmless

provision was unenforceable when they drafted the Divorce Decree." Finding 4.

d. "The defendant violated the hold harmless provision in the Divorce Decree when he failed to make timely mortgage payments, causing severe harm to the plaintiff's credit because she is still an obligor on the mortgage." Finding 5.

e. "The plaintiff suffered great injury due to the defendant's failure to make timely mortgage payments on the Property. The defendant's failure severely damaged the plaintiff's credit rating, making it next to impossible for her to get any type of loan, even in a small amount. As a result, plaintiff has been unable to purchase property, a car, receive a loan for medical payments, and has basically been unable to move on from her marriage to the defendant" Finding 6.

f. "Until the defendant cures his financial situation, the plaintiff is essentially in thrall to the defendant. The defendant may not cure his financial situation within a reasonable time. This was not contemplated by the parties when they drafted the Divorce Decree. The sale of the Property is the elegant solution to this manifest injustice. If attorneys had been involved in the drafting of the Divorce Decree, language likely would have been included requiring the sale of the Property, or some other remedy, in these circumstances." Finding 8.

g. "The harm to the defendant in being required to sell the Property, is that he would have to move his family and that he likes the home. Having to move is best described as an inconvenience." Finding 9.

h. "The defendant has unclean hands in this matter. The defendant induced the plaintiff to sign a quitclaim deed for the Property, and used the quitclaim deed to reduce the mortgage payments for his sole and personal benefit. The defendant made disingenuous comments through his attorney to the effect that the reduction in mortgage payments benefitted the plaintiff. The reduction in mortgage payments did not benefit the plaintiff at all". Finding 10.

i. "The defendant demonstrated no empathy for the plaintiff for the financial situation she is in as a direct result of his action and/or inaction." Finding 11.

CP 345-348.

Issues Pertaining to Assignments of Error

1. Did the court have the authority to modify a stipulated dissolution decree under CR 60(b)(11) without requiring the benefiting party to give notice to the aggrieved party or proper service, without regard to the passage of time since the divorce?
2. Did the court have jurisdiction to allow a modification under CR 60(b)(11), or was it limited to only vacating a decree?
3. Did the court abuse its discretion when it applied "extraordinary circumstances" to the parties' situation under CR 60(b)(11)?

4. Was the Respondent estopped from bringing action against the Appellant when he offered her possession of the property, and she declined?
5. Did the court err when it ordered the sale of the home with terms and conditions that went beyond the original terms that the parties agreed on in their dissolution decree?
6. Does the court need to require filing and preservation of attorney fees for review, as well as eliminate fees related to unsuccessful theories in order to award them to the prevailing party?
7. Did the court abuse its discretion by forcing the sale of the Appellant's home, in absence of a breach of oral contract, and for equitable reasons?

III. STATEMENT OF THE CASE

Otto and Diana were married and soon purchased a house together in Vancouver, WA in 2007. CP 82. At the time, the home and mortgage were valued at $335,000. CP 83. The parties' loan was interest-only and carried a balloon payment. CP 83. They divorced in 2008. CP 83. By this time, the house value had declined to approximately $320,000, (Ex. 13 at 6) with the mortgage remaining at its original principal. CP 83. Diana moved into an apartment (Trial RP 48), and never made any further contribution or payments to the house. RP 131, CP 112.

The parties prepared their own dissolution decree, awarding all property and liabilities. Ex. 6 at 3-5. Both freely and voluntarily agreed on the property division, and the court approved it. Trial RP 95. This was the first of two times that Diana was offered the house and its associated liability. CP 40, 307.

She refused, saying it was "too big" for a single woman, and since Otto had children, it would be more appropriate for him. CP 83, 307. Otto remained, and the parties wrote into the decree that Otto would be awarded the house and its mortgage. Ex. 6 at 3,4; CP 83, 110.

In the ensuing years, the housing market continued its national decline, and the Vancouver house also declined – at one point, falling close to 50% of its original value. Ex. 13 at 6. Otto remarried during this time, which later complicated this case. CP 83. Diana opened conversations with Otto to do something about the mortgage they shared, as she wanted to become a homeowner again. Ex. 7 at 5. Otto worked with her to see if they could come up with solutions. CP 83; Ex. 13 at 2-6; Ex. 7 at 2-5. Otto sent her a quitclaim deed pursuant to the 2008 divorce decree, but Diana never returned it. Ex. 7 at 2.

Diana pushed for a short sale in 2011. Ex. 7 at 5. Bank of America suggested a loan assumption, where Diana would be relieved from the mortgage. Ex. 7 at 5. Diana confirmed receiving these documents in March 2011. Ex. 7 at 5. Although an assumption could remove her name, she never returned the documents and indicated in May that she would not be doing so because it would not "make a differen[ce] for [her] credit". Ex. 7 at 5; Trial RP 98.

Later in September, Diana advised Otto that she wanted to move back into the house and that she qualified for her own modification that would let her live in the house and pay monthly mortgage of $1200. Ex 7 at 2. For the

second time, Otto agrees to let her have the house. Trial RP 17, 32, 40, 98, 118. He asks that she qualify for a mortgage modification and with help from an attorney, that they transfer the title to her. Ex. 7 at 2; Trial RP 31, 32. A week later, he follows up with her. Ex. 7 at 2. Since he never hears any more about the subject, he assumes that Diana does not want to live in the house. Ex. 7 at 2.

In 2012, Bank of America offers to forgive part of the mortgage principal through the National Mortgage Settlement. Ex. 7 at 3, Ex. 13 at 4; CP 39, 83, 84, 307. Otto pursues this and asks Diana again to sign a quitclaim deed pursuant to the 2008 divorce. CP 83; Ex. 14 at 3, Ex. 1 at 2-6, Ex. 7 at 4, Ex. 12 at 2.

The parties' testimony diverges on this subject.

Diana claims that both Otto and Bank of America assured her that she would be relieved of the mortgage obligation by signing the quitclaim deed and effectuating the modification. Trial RP 64-68, 72, 82. Otto claims that he never assured Diana that her name would be removed, nor could he make assurances on the behalf of Bank of America. Trial RP 15, 18, 28, 29. He relayed to her what they told him: her name may or not be removed in the underwriting process. CP 35, 45.

Diana did effectuate a quitclaim deed and Otto proceeded through the modification. CP 84. The modification did what it purported to – it both reduced the monthly payment and lowered the principal of the mortgage. Ex. 13 at 6; Trial RP 99; CP 84. It changed the original terms from interest-only,

balloon payment, to a standard declining mortgage. CP 84. Diana's name was not removed, leaving the parties in the same position, but with significantly less obligation on the house. CP 84. Otto kept making timely payments until the first of two trials in 2016, and their associated costs, caused him to pay late. Trial RP 108, 120.

In August 2013, assisted by attorney Robert Repp of Oregon, Diana requested that Otto make another attempt at removing her name. CP 84. Bank of America turned him down because they do not perform assumptions from loans brokered through ACORN Housing, which this one was in 2008. CP 84; Ex. 13 at 5.

Diana made several attempts at obtaining large (i.e. mortgage) and small loans (i.e. medical loans, personal loans) with apparently limited success. Trial RP 45-47. She attributed this to the joint mortgage she shared with Otto. Trial RP 45.

Litigation started in 2014, with Diana retaining Clark County attorney Thomas Foley – also judge pro tempore in Skamania County. CP 1, 2, 84. By this time, Otto had separated from his subsequent wife and was preoccupied with a protracted, costly custody and dissolution proceeding in Clark County. CP 84; Trial RP 106. At the time of onset of litigation, the mortgage was up-to-date, with all payments timely. Trial RP 124; CP 40.

Diana propounded interrogatories (CP 16-27), which Otto answered. CP 39. Otto submitted his own interrogatories. CP 43, 116. But Diana refused to answer these (CP 31), saying they were irrelevant. CP 319, CP 31. Diana filed

a protective motion. CP 35. Otto moved to compel Diana to answer. CP 9. In a protective oral decision, the court ordered that Diana did not have to answer. 8/27/15 RP 10. The court said that Otto may re-submit interrogatories regarding Diana's request for damages for the court's approval. 8/27/15 RP 10.

In a hearing to set trial, Otto attempted to admit a second, much smaller, set of interrogatories (CP 68-79, 118), Mr. Foley suggested that there was no need for discovery since it had already been done in the 2008 divorce. 1/14/16 RP 7. The court suggested that Otto that this was a breach of contract case, and any discovery should be in relation to breach of contract. 1/28/16 RP 13. The court did not allow the second set of interrogatories, holding them irrelevant and broad. 1/28/16 RP 13. The court indicated that this breach of oral contract was "black-letter law" (1/28/16 RP 12) and that the parties would be in status quo if no breach was found. 1/28/16 RP 21. The court asked why Otto could not simply refinance the house, and Otto described that his current wife did not pay some medical bills during separation which impacted his credit. (RP 125; 1/28/16 RP 14 [The record mistakenly substitutes Mr. Foley speaking here, when in actuality, it is Otto, which is evident by the context.])

The trial commenced February 26, 2016. 2/26/16 RP 1. Diana was represented by Thomas Foley of Clark County. 2/26/16 RP 1. Otto was represented by Millie Roberge of Clark County. 2/26/16 RP 1. In opening statement, Diana argued that Otto made an offer to take Diana's name off the loan, an acceptance, and part performance on Diana's part. 2/26/16 RP 7. Otto

argued that there he never made any assurance or offer to remove Diana's name from the mortgage. 2/26/16 RP 9. He also argued that because the house was underwater for most of the past eight years, it was previously impossible. 2/26/16 RP 9. Although he had never attempted a refinance before 2016, to avoid trial, he had made recent attempts at refinance and was attempting another. 2/26/16 RP 9-10. After opening statements by both parties, the court gave Mr. Foley the opportunity to postpone trial to give Otto a chance to refinance and so his client would not risk losing on breach of contract. 2/26/16 RP 14.

Approximately one hour after the parties left the courthouse, Mr. Foley approached the bench ex parte and moved to withdraw an earlier order and present it on the next continued trial date, which the court granted. (Supp. RP 1)

In between dates, Diana moved the court to amend the complaint for the second time to remove her name from the mortgage due to being and undivided liability. CP 96. It was cited for the next trial date. App. B, Sub 54, 55. However, it was never adjudicated on and presumed void.

The trial continued on April 14, 2016 with testimony only from Diana and Otto. Trial RP 2. Otto's refinance was still pending. Trial RP 5. (And would ultimately result in a denial.) Trial RP 100. Otto recently was late paying the mortgage due to a competing need to pay for attorney fees. Trial RP 13.

In parties' additional opening statements, Diana reasserted that Otto had verbally told her that he would remove her name from the loan. Trial RP 7.

Because of this alleged breach of oral contract, Diana asked that the home be sold with the aid of a special master or that Otto restore the house to Diana. Trial RP 7-8. Otto denied that there was any promise to take her off the loan. He also argued that despite attempts to remove her, those acts do not constitute a contract. Trial RP 9.

Diana presented evidence showing that there were unsuccessful attempts by Otto to remove Diana from the loan. Ex. 3, 4, 5. The 2008 divorce decree was admitted, which showed that Otto was awarded the liability of the house. Ex. 6. He testified that Diana was offered ownership of the house in 2008, as part of the divorce, an again in 2011. Trial RP 40, 98, 118.

Diana testified that she wanted her name off the loan. Trial RP 42. She said that her credit was damaged and she was unable to qualify for even small loans. Trial RP 45-47. Some of the reasons for these denials were delinquent credit obligations, insufficient income, excessive obligations, foreclosure or repossession, balances on revolving accounts, and poor credit performance. Ex. 9, 10, 11. Diana alleged that because she lived in an apartment and not a house, she could not conduct her sewing business and bring in customers. Trial RP 48. Diana did not admit any credit reports to the record. Trial RP 126.

She described having at least four credit cards with balances (Trial RP 49-53), and a car loan. Trial RP 54. She had significant expenditures related to attorney fees (Trial RP 50, 51) and surgeries. Trial RP 52. She used her credit cards to pay for rent due to loss of income. Trial RP 60.

Diana alleged that Otto had not only done a modification, but had agreed to a refinance. Trial RP 58 (not conceded). She could not remember details of the alleged conversation or details of the alleged refinance. Trial RP 58. Nor could she produce exhibits where Otto agreed to refinance the house. Trial RP 62-63.

Diana alleged that Otto was going to take her name off the loan during the 2013 loan modification Trial RP 66-67 (not conceded). Additionally, she alleged that a representative from Bank of America told her that her name would be removed. Trial RP 67-68, 70-72. Diana claimed that Bank of America told her that she would have to sign a quitclaim deed. Trial RP 72. Later, she says that Bank of America was less definitive about removing her name. Trial RP 73. She said that she qualified for a modification based on her income to move back into the house. Trial RP 74. She alleged that Otto offered, but would not let her move back into the house Trial RP 75 (not conceded).

Mr. Foley introduced evidence that Otto never authenticated. Trial RP 35-36, 123. Otto said that he did not know the document he showed him, or where it would have come from. Trial RP 123.

Diana closed her case in chief and the due to time constraints, the trial continued. Trial RP 85. The court, without prompting from either party, asked both parties to brief the court about modifying a divorce decree. Trial RP 85-86. The court wanted to know if he had the authority to modify the decree if equity demands it, even if they did not have an agreement. Trial RP 85-86.

In her brief, Diana argued that Otto circumvented the intent of the parties and the court by violating the hold harmless provision of the decree, and therefore harming her credit. CP 258-303. Because the court nor the parties contemplated this, it was extraneous to the action of the court, and therefore represented extraordinary circumstances authorizing application of CR 60(b)(11). CP 260.

In his brief (CP 103), Otto argued that CR 60 was not a remedy available. CP 108-111. The outcome of late payments was not unreasonable given the fact that the parties took out a high-risk loan together when they purchased the home. CP 111.

The trial was continued to April 29, 2016. Trial RP 87. Otto's attorney asked about the seven missed payments before the 2013 modification, and two late payments in 2016. Trial RP 91. Diana alleged there were forty two missed payments before, and two late payments recently. Trial RP 91. She did not submit documentation to support her claim of forty-two missed payments. (Trial RP 119), and Otto challenged this. Trial RP 109. She described that she was offered the chance to move back into the house (Trial RP 91, 92) and that she had the opportunity read and sign the 2008 divorce decree. Trial RP 94-95.

Otto testified that he had never made an offer to refinance the house (Trial RP 99), or that he would definitely remove her name from the loan. Trial RP 99. He also said that a refinance was impossible until probably 2014-2015 because of the negative equity in the home. Trial RP 99. He testified that due

to his recent divorce, he's incurred over $100,000 in legal fees (Trial RP 106) and sustained damage to his credit, so a current refinance would be improbable. Trial RP 103.

Over multiple objections, Mr. Foley introduced the April 21, 2016 Findings of Fact and Conclusions of Law from Otto's recent divorce. CP 320; Ex. 15. Otto denied or assigned errors to many of the facts put to him, including a finding of intransigence, and a finding that he had requested a removal of his wife's name from pediatrician records. Trial RP 111-113. Ms. Roberge objected three times on relevance, and the court overruled each time stating, "The door's wide open," and "I'm gonna hear anything about this other divorce now." Trial RP 110-112. Otto said that he would be challenging the findings of the divorce. Trial RP 127. He also said that he would be willing to pay for Diana's credit repair and do a refinance once he was able to if it would alleviate Diana from the obligation. Trial RP 128.

In closing argument, Diana argued that her credit was harmed to the point that she could not qualify for loans (Trial RP 134), and suffered harm due to a breach of contract (Trial RP 136). She urges the court to apply its discretion under CR 60(b)(11) and find extraordinary circumstances because Diana is still bound to the mortgage of the 2008 divorce decree without court intervention. Trial RP 137. She asks the court to read Otto's most recent court decree because of alleged tactics and lack of cooperation (not conceded) and its alleged relevance to this case. Trial RP 139. There was no way for the parties or the court to foresee the current circumstances. Trial RP 139. She

requests that special master be appointed to sell the house for Otto, and an award of attorney fees. Trial RP 140, 150.

In his closing arguments, Otto argued that Diana could not articulate that the elements of an oral contract existed between the parties: offer, acceptance, "meeting of the minds", etc. Trial RP 141. Further, the statute of frauds prevents oral contracts regarding real property. Trial RP 141. He argued that in a court of equity, the court has to examine the hardships of both parties and balance the hardships imposed. Trial RP 142. Further, reopening final decrees is against public policy because it could open a floodgate of modifications of decrees. Trial RP 143. He also extended again his offer of credit repair and future refinance to the court, in an effort to satisfy the needs of both parties. Trial RP 144, 145.

Diana said in rebuttal that Otto's retirement account grew substantially during the time he allegedly failed to make timely payments. Trial RP 148. Further, he violated the hold harmless agreement by creating the situation that negatively affected her credit, which resulted in her inability to carry on a business, obtain a home loan, or acquire other loans. Trial RP 148, 149. She reiterated that the intent of the dissolution agreement was to free her from the mortgage. Trial RP 149.

The court imported generously from Diana's requests and held that the parties created the problem, probably unknowingly, when they created their pro se divorce. Trial RP 151. It applied its discretion to modify the decree under CR 60(b)(11) because the parties did not contemplate that there would

be no remedy for Diana if Otto fell behind on mortgage payments, that she could not remove her name, or that the hold harmless provision could not be enforced. Trial RP 152. The court held that she could not get a mortgage or a smaller loan for medical bills, and was effectively denied the American Dream. Trial RP 152, 153. Because of Otto's recent divorce, it found that it would take him time to recover financially, and that Diana could not get around that because of an inadequate decree. Trial RP 153. The elegant solution, it held, was to sell the house. Trial RP 153. The court, balancing equity, described Otto's having to move out of his house as an inconvenience. Trial RP 154. Also, it found that Otto did not have clean hands because he used the quitclaim deed for his own purposes – whether it was because believed it would remove Diana's name, didn't know the answer, or if he had been advised this by the bank. Trial RP 155. The court said that it did not detect any empathy that Otto had for Diana's condition. RP 155. It found extraordinary reasons existed, that it was exercising its discretion to modify the decree under CR 60(b)(11) giving meaning to the hold harmless provision, and would do so to balance equity. Trial RP 155, 156. It ruled that the home would be given to a special master and realtor team, and together, they would have an obligation and the authority to sell Otto's home within 90 days, even without his signature. Trial RP 156; 1/28/16 RP 15. The remedy for non-cooperation would be drastic or automatic reductions in price. Trial RP 156. The primary purpose is to sell the property, with the secondary purpose to realize as much equity as possible. Trial RP 156, 157. The court found that

Otto was intransigent and that he had withheld an easy fix to Diana's problems, and he would award attorney fees as billed. Trial RP 157.

Over multiple written (CP 337-344) and oral objections (5/26/16 RP 5, 9, 10, 14) the court entered findings of fact and conclusion of law on May 26. CP 345-348. Among other things, Otto objected that the court could not modify the 2008 divorce decree (CP 341), that he did not violate the hold harmless agreement (CP 342), and that Diana rejected the transfer of the house to her after being offered by Otto. CP 340. Mr. Foley submitted to Ms. Roberge on that day his attorney fees of $10,955.65. 5/26/16 RP 8, 9, 10. The court also entered supersedeas bond in the amount of $40,000. CP 353-354.

On May 31, Diana cited Entry of Judgment and order for supersedeas bond (but not an amendment for the 2008 divorce decree) for June 2, without service of notice to Otto. CP 357-358. Over Otto's objection, the court entered Judgment (CP 350-352), Order Setting Supersedeas Bond (CP 353-354), and an Amendment to the 2008 dissolution decree. CP 355-356. Otto was unable to attend the hearing and Ms. Roberge only appeared telephonically due to the lack of notice. 6/2/16 RP 2. The court approved attorney fees of $16,171.46. CP 350. No statement of charges or affidavit was ever filed, although the judge apparently reviewed them in camera. 6/2/16 RP 3. [No public record of Diana's attorney fees exists for appellate review.] The court also approved entry of amendment to the 2008 divorce decree and approved supersedeas bond of $40,000. 6/2/16 RP 2, 4. Otto submitted a written objection to Diana's

untimely and insufficient notice, but this was dismissed as untimely. 6/2/16 RP 6.

In an effort to halt aggressive enforcement action, Otto submitted a bond for $10,000, but the court deemed that it was insufficient. Supp. RP 7. In later proceedings, the trial court held Otto in contempt for failure to cooperate with the forced sale of his house, which he controverted. Supp. RP 8. The intention of the Respondent is to execute on the judgment. Supp. RP 8.

Otto made multiple motions the Court of Appeals to stay enforcement action of the trial court. Both a commissioner and a panel of judges denied his motions.

IV. ARGUMENT

A. INTRODUCTION

The trial court ignored the overwhelming number of times that the courts have denied modification of consent decrees. Even in light of the facts and the alleged harm to Diana, the court had no authority to modify the terms of the dissolution decree that Otto and Diana had agreed on in 2008.

B. STANDARDS OF REVIEW

A modification of a dissolution decree is reviewed for abuse of discretion. *In re Marriage of Michael*, 145 Wash.App. 854, 859, 188 P.3d 529 (2008). The court abuses its discretion if, absent of authority, it disposes of the property that was already rightfully awarded to a former spouse in a dissolution decree. *In re Marriage of Bobbitt*, 135 Wash.App. 8, 20, 144 P.3d 306 (2006). Abuse of discretion is true if a court's decision is manifestly

unreasonable or based on untenable grounds or untenable reasons. A decision outside the range of acceptable choices is manifestly unreasonable. Factual findings unsupported by the record are untenable grounds. When a court makes decisions based on incorrect standards, or the facts do not meet the requirements of the correct standard, it does so for untenable reasons. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).

Attorney fees are reviewed for abuse of discretion. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597, 675 P.2d 193 (1983).

Neither Otto nor Diana (as yet) argue any ambiguity about the 2008 decree. However, the interpretation of a dissolution decree is a question of law. *Chavez v. Chavez*, 80 Wash.App. 432, 435, 909 P.2d 314, review denied, 129 Wash.2d 1016, 917 P.2d 576 (1996). Questions of law are reviewed de novo. *McDonald v. State Farm Fire and Casualty Co.*, 119 Wash.2d 724, 730–31, 837 P.2d 1000 (1992).

C. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT AMENDED THE 2008 DISSOLUTION DECREE

The trial court was not coy about its intentions when it fashioned its order. In the court's opinion, Otto had caused severe harm to Diana; he had failed to correct this; and he would pay.

Unfortunately, in its quest for equity and justice, the trial court abandoned the path of reason. It failed to consider the considerable weight of authority that came before it. Previous authority is aligned against the outcome that occurred in this case.

There are few cases that justify *vacating* a consent divorce decree under CR 60; fewer still justify *modifying* a decree under CR 60, which is what happened here; and any cases that *modify* a consent divorce decree *as old as this one* under CR 60 are unicorns.

Otto argues that the trial court greatly exceeded its authority when it re-opened the divorce decree, and the judgment cannot stand for numerous reasons.

1. *The trial court amended the divorce decree under CR 60, but did not follow the rule's procedures.*

Diana filed a motion for relief under CR 60(b)(11), but not an affidavit. The absence of an affidavit is not necessarily fatal. *In re Marriage of Tang*, 57 Wash.App. 648, 653, 789 P.2d 118 (1990). CR 60(e)(2), (3) outlines the remaining procedure: "Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof ..." and, "The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons ... but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court."

CR 60(b) is not properly before the court if the requirements of CR 60(e) are disregarded. *Allen v. Allen*, 12 Wash.App. 795, 797, 532 P.2d 623 (1975). (Appeals Court held that wife's oral motion to vacate was not properly before the court. Husband was not given the opportunity to prepare a response to the motion or present evidence.)

Here, the trial court made a request before trial continued for the parties to prepare briefs on "modifying a divorce decree." Trial RP 85. Diana did move the court, however, on the same day as the next scheduled trial court day, and the same day this motion was adjudicated: April 29. CP 256-257. No notice was given, and the record does not contain any. Neither, of course, was there any service consistent with CR 60(e). Otto was not given the opportunity to prepare for the motion, and the motion was not properly before the court. The court erred by failing to follow procedure, plainly outlined under CR 60(e).

CR 60(e)(1) also requires that the motion needs to made in the same cause (or presumably consolidated, which never occurred here either): "Application shall be made by motion filed in the cause...".

Diana never moved the court within the original dissolution case (Skamania 08-3-00029-5). Procedurally, she neither properly perfected the requirements of CR 60, nor moved within the original cause. Besides the original action in 2008, the only filing within the original divorce cause is the amendment and clerk's notes on June 2, 2016. CP 355-356; App. A, Sub 11, 12. As with the requirement for the affidavit, notice, and service requirements, the court disregarded this aspect of the rule.

The liberal provisions of CR 60(b)(11) do not excuse a litigant from moving the court within a reasonable time from the original decree: "The motion shall be made within a reasonable time..." Courts may consider relevant factors for timeliness such as whether the nonmoving party is prejudiced by a delay or if the moving party could have taken action sooner.

In re Marriage of Thurston, 92 Wash.App. 494, 500, 963 P.2d 947 (1998). There is no question that Otto and his family were firmly entrenched in the property at this time. Trial RP 103, 131, 132, 143. After all, this was their home. When Diana initiated litigation in 2014, the mortgage was current. Otto had been diligently paying down the mortgage and the home had just reached the point where it was no longer underwater. Ex. 13 at 6. Diana's action should have occurred years earlier before Otto had relied on the agreements within the divorce decree, quitclaim deed, and the declined offers to move back into the house. Instead, Diana waited six years after the divorce decree to take action.

Diana may point to the fact that she made attempts starting in 2011 to extricate herself from the loan. Ex. 7 at 5. While this is true, it begs the question why she waited almost three years after the parties consented to their divorce to begin to remedy her situation. Clearly, there was no urgency on her part. Diana's application of CR 60(b) was untimely because she has no reason why her legal action took so long, and that delay caused prejudice to Otto. The court never inquired why Diana never took action sooner.

Diana does not have relief under CR 60 because the threshold requirements of notice and service never occurred. Further, no action was ever made in the original cause until it was amended on June 2, 2016. Diana never sought reconsideration of the divorce decree, nor appealed it. Neither did she motion under CR 60 for mistake, inadvertence, or newly discovered evidence,

which she could have done within one year of entry. This court should hold the trial court to the statutory standard and reverse the judgment.

2. *CR 60 is limited to vacating a judgment and cannot be used to modify a decree or grant affirmative relief to the Respondent.*

The application of CR 60 is generally limited to offering relief from a judgment, and cannot grant affirmative relief or modification of a decree to the movant. CR 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding..." It does not provide that an order may be *amended*, for example, under CR 59(h). "Normally, however, a judgment cannot be amended under CR 60 to add something to the judgment, or to make some other change in the content of the judgment, that was not intended at the time the judgment was entered." 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § CR 59 authors' cmt. at 31 Motion to alter or amend judgment (2016)

"A decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced." *In re Marriage of Thompson*, 97 Wash.App. 873, 878, 988 P.2d 499 (1999), citing *Rivard v. Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969). The trial court cannot modify property dispositions without the existence of conditions justifying reopening the decree under laws of this state. *In re Marriage of Bobbitt*, 135 Wash.App. 8, 18, 144 P.3d 306 (2006). RCW 26.09.170(1) states in part: "The provisions as to property disposition may not be revoked or modified, unless

the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." Further: "A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment." *In re Marriage of Thompson*, 97 Wash.App. 873, 878, 988 P.2d 499 (1999) (citing *Kern v. Kern*, 28 Wash.2d 617, 619, 183 P.2d 811 (1947)).

In this case, the court liberally modified the divorce decree in the amendment. CP 355-356. The court divested Otto from his family home, effectively evicting him from his own property. The court also imposed a special master and realtor upon the sale so that Otto could no longer make any sale decisions about his property. In doing so, the court substantially modified the divorce decree and removed Otto's property rights.

"It has been the rule in Washington that the trial court does not have jurisdiction to order the sale of the parties' assets without their consent because there is no statutory grant of such power to a trial court." *In re Marriage of Bobbitt*, 135 Wash.App. 8, 16, 144 P.3d 306 (2006) (citing *High v. High* 41 Wash.2d 811, 822–23, 252 P.2d 272 (1953); *Arneson v. Arneson*, 38 Wash.2d 99, 101, 227 P.2d 1016 (1951)). The *Bobbitt* court did observe other cases in which the court sold property, and stated: "But in each case the trial court's consideration of the issue occurred during the pendency of the case or at the conclusion of the trial, *not after a full and final division of the property had been made*, as occurred here." (Emphasis added.) In the *Bobbitt* case, the court held that the trial court abused its discretion and acted beyond

its jurisdiction in selling the husband's home two years after it was awarded to him as separate property in the dissolution decree.

The trial court here also did not have the jurisdiction to sell Otto's home eight years after an award. Although it made its decision "in equity", it did so without statutory grant of authority in Washington. In fact, it did not have any statutory grant of authority to sell his home after such a long passage of time, or under these conditions. Nor did it have the support of cases that have come before it. Even in trial, Diana admitted that she did not see the connection between her breach of oral contract case and the divorce decree: "What does divorce have to do with this case? I don't know." Trial RP 95. Her attorney admitted skepticism about re-opening the decree: "...you know, perhaps it's a basis for opening the whole divorce, but we're not gonna obviously do that..." 1/28/16 RP 17.

An application of CR 60 is not the proper vehicle to add terms to a judgment that were never incorporated into the original. Attempts at "fixing" an original judgment have generally failed. *See Seattle-First Nat. Bank Connell Branch v. Treiber*, 13 Wash.App. 478, 481, 534 P.2d 1376 (1975); *see also Kemmer v. Keiski* 116 Wash.App. 924, 932, 68 P.3d 1138 (2003).

Here, the trial court stated, "A dissolution decree in Washington State can be vacated *or modified* for extraordinary circumstances to overcome a manifest injustice, under CR 60(b)(11). That's the standard. I have the discretion to do that, if the facts meet that standard." (Emphasis added). Trial RP 151. The trial conclustion of law states, "1. A divorce decree may be

vacated or modified by the court..." CP 347. This is error – the trial court did not meet the requirements of the standard. CR 60(b)(11) allows a judgment to be set aside, but not modified. *Geonerco, Inc. v. Grand Ridge Properties IV, LLC* 159 Wash.App. 536, 543, 248 P.3d 1047 (2011). (The trial court erred when it granted numerous forms of affirmative relief beyond what was intended in the decree.)

The Skamania trial court burdened the amendment with numerous applications of affirmative relief that the parties never agreed upon. CP 355-356. The court ordered: that Otto's home be sold at an aggressive pace; that the court would entertain "drastic" price reductions if it did not sell in that timeframe; to assign a special master and a realtor that would act in Otto's stead, both paid from the sale proceeds. These conditions greatly expand on anything that the parties ever contemplated when they consented to their divorce decree in 2008.

Diana had remedy to modify the decree under CR 59, but did not attempt to do this. She also had the right to appeal if she felt that the decree was unfair. She passed this up too. Now, she comes to the court claiming inequity. Washington courts have long warned against re-opening divorce decrees, yet the trial court pursued this anyway. "To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. The uncertainties which

would result would be devastating." *Peste v. Peste*, 1 Wash.App. 19, 25, 459 P.2d 70 (1969).

The trial court did not have the authority to load up the decree with multiple conditions in order to right a perceived wrong. This was an improper modification to the divorce decree. Diana should not be allowed to now revisit a consent divorce decree that she freely and voluntarily entered into. The court abused its discretion when it applied CR 60(b) to modify the decree, when in actuality; a modification is under the purview of CR 59.

3. *The parties' circumstance did not rise to the "extraordinary circumstances" standard.*

It is well established that modifications to dissolution decrees under CR 60(b)(11) are confined to reasons that are "extraordinary circumstances" relating to irregularities which are extraneous to the action of the court. *In re the Marriage of Flannagan* 42 Wash.App. 214, 221-224, 709 P.2d 1247 (1985); *In re Marriage of Michael*, 145 Wash.App. 854, 861,188 P.3d 529 (2008).

Cases that support a trial court's decision to vacate a decree are rare. A decree may be vacated for being against public policy and unenforceable. *In re the Marriage of Hammack* 114 Wash.App. 805, 811-812, 60 P.3d 663 (2003). Courts could, before a change in law, vacate a decree after the enactment of the Uniformed Services Former Spouses Protection Act (USFSPA). *In re the Marriage of Flannagan* 42 Wash.App. 214, 224-225, 709 P.2d 1247 (1985). *Compare In re Marriage of Michael,* 145 Wash.App.

854, 862, 188 P.3d 529 (2008). A decree was partially vacated when husband failed to transfer property to wife and then made a new statement of position that was contrary to what was stated in settlement. *In re Marriage of Thurston*, 92 Wash.App. 494, 502-504, 963 P.2d 947 (1998). The first three cases have no application here, and the last has limited application to the facts in this case.

Diana relied heavily on *Thurston* in her brief to the trial court. But, this case is distinguishable in many respects. In *Thurston*, the 1989 decree contained plain language that a property transfer was to occur quickly. The husband subsequently stated that this was to transfer at a future date, not immediately. The wife promptly motioned the court under CR 60(b). In this case, no terms regarding transfer of the mortgage were ever written into the divorce decree, and neither party stated as such. Diana and Otto never agreed at the time, or subsequently, that Otto would (or could) relieve Diana from the mortgage. In *Thurston*, the former wife moved the court 19 months after the 1989 decree, and soon after learning of the former husband's controversion of the original decree. Here, Diana seeks to vacate the decree almost eight years after they were divorced. She had full knowledge of the failure within the decree to transfer the liability from the day she agreed to it. Lastly, in *Thurston*, the court partially vacated the decree, and apparently allowed the parties to re-work another settlement. Here, the court instead amended the original decree instead of vacating it. It also imposed conditions on Otto that

were never contemplated by the parties and effectively hogtied him from making material decisions about his own real property.

Washington courts hold pro se litigants to the same standard as attorneys. Further, attorney mistakes are not extraneous to court action and not extraordinary. *See Lane v. Brown & Haley*, 81 Wn. App. 102, 106-109, 912 P.2d 1040, rev. denied, 129 Wn.2d 1028, 922 P.2d 98 (1996) (no relief for attorney mistakes under CR 60(b)(11)); *In re Marriage of Burkey*, 36 Wn. App. 487, 490-91, 675 P.2d 619 (1984) (inadequate representation did not justify relief under CR 60(b)(11)); *Bergren v. Adams County*, 8 Wn. App. 853, 857, 509 P.2d 661 (1973) (excusable neglect or mistake not a basis to apply CR 60(b)(11)).

In its findings of fact, the court held that the problem was "created by the parties when they drafted their divorce decree...pro se." CP 345. It opined that had they used legal representation, that a competent attorney would have made provisions to transfer the debt to Otto, and the parties did not contemplate a remedy for late payments. Trial RP 151-152. Since pro se litigants are held to the same standard as attorneys, the court erred when it made this finding as a basis to modify under CR 60(b)(11).

The court's comments that the parties *should* have gotten an attorney and this attorney *would* have had the foresight to mandate a refinance at a later date are both thin and speculative. RP 151-152. Nothing stopped Diana (or Otto) from seeking legal assistance back then, and nothing guarantees that an attorney would have written in refinance terms into the decree. The court's

speculation is that an idealistic set of circumstances should have been implemented in 2008, and because they were not, they should be now be corrected.

The court held that the hold harmless provision was violated when Otto "failed to make timely mortgage payments, causing severe harm to the plaintiff's credit..." However, this is a misreading of the hold harmless provision, which reads, "Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party." Ex. 6 at 5,6.

However, Otto alone made all payments for the home. Trial RP 131,154 The hold harmless agreement would only have been violated if Diana had made payments to Bank of America to keep the mortgage current. She would have then been able to take action against Otto for recovery. This never happened, as Diana never paid the mortgage after she moved in 2008. At the time of the divorce, the loan was underwater, and would remain in that state for the next 6 years. Ex. 13 at 6. There was no way that either party could have contemplated a refinance in 2008 because the house had already declined precipitously from the time they purchased two years earlier. The parties did the best they could under the circumstances.

Without adequate explanation, the court found that the hold harmless provision of the divorce decree was not enforceable. However, this provision is enforceable through contempt action. But since it was never violated, it

could not be invoked. She would still not have had the remedy of a modification of the decree. *In re Marriage of Curtis*, 106 Wash.App. 191, 197-198, 23 P.3d 13 (2001).

The court erred when it wrote, "Extraordinary circumstances exist which justify the modification of the Divorce Decree to give meaning to the hold harmless provision under CR 60(b)(11)." CP 347. Not only did the court misinterpret the plain meaning of the hold harmless provision, it improperly called it an "extraordinary circumstance" that fell under CR 60(b)(11). The fact that there was a provision to protect Diana in the event of collection action means that the parties at least gave some consideration to the possibility of late payments. Any failure to pay would therefore be "ordinary" and not "extraneous" to the court.

Diana alleged numerous credit problems stemming from Otto's late payments. However, of the four letters that were admitted, only one has mention of the mortgage payments. Ex. 8. (Otto maintains that this exhibit was never authenticated and improperly admitted. Trial RP 35-36, 122-123) The other letters list numerous other reasons why she was turned down that have no bearing on the mortgage such as: foreclosure, insufficient income, excessive obligations, and credit limits on her revolving accounts (i.e. credit cards). Ex. 9, 10, 11. No foreclosure action was initiated against the property, and Diana does not present any evidence of such.

The court did not find that the decree was ambiguous, nor did Diana argue this. The decree was never unambiguous to the parties, nor does the record

show that there was any dispute about the property agreement when the parties divorced. It was interpreted in 2008 exactly as it was interpreted in 2016: for better or worse, the parties never made arrangements to have Otto assume the loan – Diana says this herself. RP 98.

Fraud or misrepresentation is grounds for a modification under CR 60(b). *See In re Marriage of Burkey*, 36 Wash.App. 487, 489-490, 675 P.2d 619 (1984). However, no such deception occurred and Diana does not allege any. All property and their values were known at dissolution to both parties. The court's finding of unclean hands is an affirmative defense, not a way to effectuate "extraordinary circumstances."

Errors, misapprehension, or surprise of the parties are also not justifiable reasons to modify a consent decree. *See Haller v. Wallis*, 89 Wash.2d 539, 545, 573 P.2d 1302 (1978).

4. *The court erred when it did not recognize that the Respondent was estopped from relief.*

Diana was estopped from taking action against Otto since she had already been offered the house twice. Diana pleaded to the court to allow a transfer of the home back to her, or to sell the home. Trial RP 7-8. The court erred by not recognizing that she was estopped from demanding either remedy.

Three elements must exist for equitable estoppel: (1) acts, statements, or admissions inconsistent with a claim subsequently asserted, (2) action or change of position on the part of the other party in reliance upon such acts, statements, or admissions, and (3) a resulting injustice to such other party, if

the first party is allowed to contradict or repudiate his former acts, statements, or admissions. *Fritch v. Fritch*, 53 Wash.2d 496, 505, 335 P.2d 43 (1959).

Diana was first offered to occupy the house when the parties first divorced. Trial RP 17; CP 307, 313. She refused, saying it was too big for her. Diana also stated in 2011 that she qualified for a modification and would move into the house. CP 332. Otto agreed to this as long as they could transfer title. Several weeks later, Otto followed up. Due to Diana's non-response, Otto reasonably assumed that she declined his offer. Because she declined both times, Otto relied on this and remained in the home and paid for it. Now, Diana is claiming harm from the situation that she has twice refused remedy for. The resulting injustice is that Otto now will be divested in the home that he and his family have had for eight years.

5. *Right or wrong, the parties never made any agreement that the Appellant would assume sole responsibility for the liability.*

Mr. Foley states that there was a clear intention of the parties to transfer the liability. Trial RP 135, 149. But, this is not supported by the record, or his own complaint. CP 98. The divorce decree makes no reference to dividing the mortgage. Ex. 6 at 3. Otto testified that he never promised Diana that he would get her name off the loan. Trial RP 99. The first time Diana first mentions any grievance is in 2011, over two years after entry of the divorce decree. Ex. 7 at 4.

At the time of their divorce, the house was hopelessly underwater and unable to be refinanced. Both parties knew that there was no way to transfer

the liability. The court speculated that had they used an attorney for their divorce, then an attorney would have seen to the mortgage transfer. Trial RP 153-154. As stated earlier, however, the parties entered this agreement voluntarily, freely, and had the opportunity to seek legal help. There is also no guarantee that an attorney "would have" included remedial language to ensure a transfer. The court erred by imposing its own terms on a decree that the parties had already agreed on.

Diana alleges that Otto made an oral agreement to refinance. Not only did the trial court not hold this to be true, the statute of frauds demands that all contracts involving real property (including associated loans) must be written and not orally conducted. The parties made no such agreement, and the trial court found none. CP 89, 319.

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT AWARDED FEES TO THE RESPONDENT

The trial court awarded attorney fees to Diana improperly. The court did not properly assess Otto's ability to pay fees, did not exclude charges for Diana's failed theories, and did not review a properly filed cost bill. Instead, the court reviewed Mr. Foley's cost bill in camera and failed to preserve a record of it for review.

The trial court modified a divorce decree; in Washington, fees awarded in family law cases are assessed for the ability of parties to pay. *In re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985). The court knew that Otto had exhausted his

funds in the concurrent Clark County divorce. Trial RP 153. Otto advised the court that he had already spent over $92,000 fighting the divorce. 1/28/16 RP 19. The court detailed in findings of fact that he is in a worse financial condition due to the Clark County divorce. CP 346. The court erred when it awarded fees to Diana knowing that Otto's financial condition was harmed after his divorce.

The court did not find that Otto had orally breached a contract. CP 345. Since Diana's complaint was brought about by a breach of oral contract (CP 1, 57), she was not entitled to fees for the all the time her attorney spent pursuing this unsuccessful line of argument. *Mahler v. Szucs*, 135 Wash.2d 398, 434, 957 P.2d 632 (1998). It was not until trial that the court suggested a modification of the divorce decree, and her case gained traction. She should not receive fees for the time she spent pursuing a breach of oral contract.

Washington courts disapprove of in camera reviews of attorney fees, and have held that these need to be preserved for appellate review. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wash.App. 700, 741, 281 P.3d 693 (2012).

Here, Diana never filed a cost bill for attorney fees nor an accompanying affidavit when the court reviewed them on June 2, 2016. (See App. B). Despite the lack of filing, the trial court judge says he reviewed the cost bill "line by line" and found them to be "prosaic". 6/2/16 RP 3. The record does not show Mr. Foley handing the bill to the court, and the court does not explain how he received them. If they were not filed and the record is absent

of an explanation, it can only be assumed that the court received and reviewed them in camera. Because there is no record of these fees, and the court improperly reviewed them in camera, they should be reversed.

E. THE TRIAL COURT HAD THE APPEARANCE OF BIAS

Otto learned after the trial that Mr. Foley is a judge pro tempore in Skamania County. Neither Mr. Foley nor the trial judge disclosed this. Although this alone does not merit bias, together with other facts in the case, this lends the appearance of bias.

Mr. Foley petitioned the court ex parte and was granted relief. Supp. RP 1. No notice of this action was given, and Otto did not learn of this ex parte action until the transcriber on appeal alerted him.

Otto was twice denied reasonable discovery. Otto answered Diana's interrogatory requests (CP 16-27), but the court denied Otto's request for interrogatories on August 27, 2015 and January 28, 2016. (8/27/15 RP 10; 1/28/16 RP 21; CP 9-34). Otto's second set of interrogatories (CP 68-79) were significantly shorter than the first, and contained questions about Diana's credit denials, property ownership, and loans – all topics that were central to Diana's complaint about her damage to her credit due to the joint liability. By slamming the door shut on pre-trial discovery, the court prejudiced Otto's ability to prepare for trial.

The court gave several pre-trial instructions or comments that it would rule on an oral breach of contract – not a modification of the divorce decree. The court said that this oral breach of contract case was a "simple case"

involving "black letter law" (1/28/16 RP 12) and "technical law" (2/26/16 RP 14). The court told Otto that if there was no breach of contract, he would be "free and clear". 1/28/16 RP 21. Right up to the trial opening statements, the court said if there was no oral contract, the parties would be back to "status quo". 2/26/16 RP 5. After opening statements, the court told Mr. Foley that this case was perhaps not as "cut and dried" as he thought it was and gave him the option of continuing so his client would not risk losing. 2/26/16 RP 11, 14.

Over multiple objections, the court allowed Diana to admit Otto's recent, and highly prejudicial, Clark County divorce facts and findings. Trial RP 110-114. The court allowed irrelevant information about his custody battle, daughter's pediatrician records, false allegations, and a contested embryo. Otto clearly stated he controverted many of the findings and was, in fact, appealing them. The court did not explain why it would need these details to rule on a breach of oral contract case, as they only served to prejudice and embarrass Otto.

Finally, the court allowed Mr. Foley to avoid rules of time computation for his client, but not Otto. On May 31, 2016, Mr. Foley cited entry for judgment and supersedeas bond two days out on June 2. CP 349. No notice was served. Otto objected. CP 357-358. But, the court still granted these as well as the un-cited amendment for the 2008 divorce decree. CP 350-356. The court did not extend the same courtesy to Otto when he moved the court for relief three days out and ruled them untimely. Supp. RP 1, 3. The court also allowed Mr. Foley to file the CR 60 motion on the same day it was to be adjudicated.

Together, these suggest an appearance of bias that wove throughout the case and created opportunities for Diana, but not Otto.

V. FEES AND COSTS

In general, self-represented litigants cannot receive attorney fees. *In re Marriage of Brown*, 159 Wash.App. 931, 938-939, 247 P.3d 466 (2011). But, the court may provide for expenses and costs of appeal under RAP 18.1 and 14.3. Otto has incurred significant expenses including transcribing the record on review and transmittal of clerk's papers and exhibits. The prevailing party may also recover costs to supersede a judgment. Otto has incurred costs in this case to Skamania County for supersedeas. Supp. RP 1-2. He also requests that this Court remand to the trial court with instructions to recover his attorney fees and costs from defending this case in Skamania County.

VI. CONCLUSION

The trial court here took a stand. It decided that it would right a perceived wrong, even at the expense of Washington rules, case precedent, and public policy. The court saw a chance to help Diana grasp her version of the American Dream by ridding her of the one obstacle that stood in her way: Otto's alleged reluctance to remove her from the obligation of the mortgage. In doing so, with rough hands and a disregard for procedure, it wrought a judgment that is not equitable, just, or legal.

Otto asks this Court to reverse the decision of trial court, dismiss the suit with prejudice, reinstate his rights to the property, reverse the award of

attorney fees, and award costs on appeal, and remand to the trial court with instructions to recover his attorney fees and costs for his trial court defense.

Respectfully submitted November 4, 2016,

Otto Guardado, Appellant

INDEX TO APPENDIX: APPELLANT'S OPENING BRIEF

Guardado v Guardado

Court of Appeals, Division Two, No. 48903-1-II

Superior Court Case Summary

Court: Skamania Superior
Case Number: 08-3-00029-5

Sub	Docket Date	Docket Code	Docket Description	Misc Info
-	07-10-2008	FILING FEE RECEIVED	Filing Fee Received	250.00
1	07-10-2008	PETITION FOR DISSOLUTION	Petition For Dissolution	
2	07-10-2008	SUMMONS	Summons	
3	07-10-2008	ACCEPTANCE OF SERVICE	Acceptance Of Service	
4	07-10-2008	CERTIFICATE OF COMPLIANCE	Certificate Of Compliance	
5	07-23-2008	RESPONSE	Response To Petition	
6	07-23-2008	CERTIFICATE OF COMPLIANCE	Certificate Of Compliance	
7	08-22-2008	NOTE FOR CALENDAR ACTION	Note For Calendar 9am - Non Contested	10-17-2008S
8	10-17-2008	MOTION HEARING	Motion Hearing	
9	10-17-2008	FINDINGS OF FACT&CONCLUSIONS OF LAW	Findings Of Fact&conclusions Of Law	
10	10-17-2008	DECREE OF DISSOLUTION	Decree Of Dissolution	
11	06-02-2016	MOTION HEARING	Motion Hearing	
12	06-02-2016	AMENDED DECREE	Amendment To Decree Of Dissolution	

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Superior Court Case Summary

Court: Skamania Superior
Case Number: 14-2-00141-1

Sub	Docket Date	Docket Code	Docket Description	Misc Info
-	10-27-2014	FILING FEE RECEIVED	Filing Fee Received	240.00
1	10-27-2014	COMPLAINT	Complaint For Breach Of Contract	
2	10-27-2014	SUMMONS	Summons	
3	11-04-2014	RETURN OF SERVICE	Return Of Service	
4	11-17-2014	RETURN OF SERVICE	Amended Return Of Service	
5	11-24-2014	APPEARANCE PRO SE	Appearance Pro Se / Cert Of Service	
6	11-24-2014	CONFIDENTIAL INFORMATION FORM	Confidential Information Form	
7	12-09-2014	MOTION FOR DEFAULT	Motion For Default	
8	12-09-2014	CITATION ACTION	Citation 1:30 - Mt For Default	01-15-2014
9	12-10-2014	ANSWER	Answer	
-	12-16-2014	CANCELLED: PLAINTIFF/PROS REQUESTED	Cancelled: Plaintiff/pros Requested	
10	02-02-2015	NOTICE	Notice Of Change Of Address	
11	04-29-2015	MOTION TO COMPEL	Cr 37 Mt To Compel Resp To Discovry Requests & Mt For Atty Fees	
12	04-29-2015	CITATION ACTION	Citation 1:30 - Motion To Compel	05-14-2015
-	05-08-2015	CANCELLED: PLAINTIFF/PROS REQUESTED	Cancelled: Plaintiff/pros Requested	
13	05-11-2015	DECLARATION	Dfndnts Dclr To Cr 37 Mt To Compel Resp Tp Dosc Req & Mt For Atty Fees	
14	05-14-2015	INTERROG & REQUEST FOR PRODUCTION	Dfndnt First Set Of Interrogatories &req For Production Docs To Plntf	
15	07-06-2015	NT FOR TRIAL & STMNT OF ARBITRABIL	Nt For Trial & Stmnt Of Arbitrabil	
16	07-15-2015	OBJECTION / OPPOSITION		

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What is this website? It is a search engine of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. The search results can point you to the official or complete court record.

			Objection To Trial Setting	
17	07-15-2015	MOTION TO COMPEL	Mt To Compel Plntf To Respond To Discovery Req & Issue Sanctions	
18	07-15-2015	CITATION	Citation Trial Setting	07-30-2015
		ACTION	1:30-def Mt To Compel/mt To Reserve	
-	07-22-2015	HEARING CANCELLED:DEF/RESP REQUEST	Hearing Cancelled:def/resp Request	
-	07-22-2015	COMMENT ENTRY	Hearing Sticken By Mr. Guardado	
19	07-27-2015	CITATION ACTION	Citation 1:30-mt To Compel Plntf To Respond	08-13-2015S1
			To Discovery/mt Reserve Trial Set	
20	08-07-2015	DECLARATION	Dclr Of Def Sup Mt To Com Dis & Mt	
21	08-07-2015	MEMORANDUM	Memo Supp Mt To Com Pla To Rsp To	
22	08-12-2015	MOTION	Mt For Prot Ord/atty Fees & Set Trl	
23	08-13-2015	MOTION HEARING ACTION	Motion Hearing 1:30-mt To Compel Plntf To Respond	08-27-2015S1
			To Discovery/mt Reserve Trial Set	
24	08-24-2015	MEMORANDUM	Responsive Memorandum To Plntf's Mt For Protective Ord,award Of Atty's	
			Fees & Ord Setting Trial	
25	08-24-2015	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
26	08-27-2015	MOTION HEARING	Motion Hearing	
27	09-08-2015	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
28	09-28-2015	STATEMENT	Statement Of Plaintiffs Damages	
29	10-05-2015	NT FOR TRIAL & STMNT OF ARBITRABIL	Nt For Trial & Stmnt Of Arbitrabil	
30	10-09-2015	OBJECTION / OPPOSITION	Objection To Trial Setting	
31	10-12-2015	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
32	01-04-2016	MOTION	Mt For Leave Of Court To Amend Complaint & Mt To Set Trial Date	
33	01-04-2016	CITATION ACTION	Citation 1:30-mt For Leave Of Court To Amend	01-14-2016S3

How can I obtain the complete court record?
You can contact the court in which the case was filed to view the court record or to order copies of court records.

How can I contact the court?

Click **here** for a court directory with information on how to contact every court in the state.

Can I find the outcome of a case on this website?
No. You must consult the local or appeals court record.

How do I verify the information contained in the search results?
You must consult the court record to verify all information.

Can I use the search results to find out someone's criminal record?
No. The Washington State Patrol (WSP) maintains state criminal history record information. Click **here** to order criminal history information.

Where does the information come from?
Clerks at the municipal, district, superior, and appellate courts across the state enter information on the cases filed in their courts. The search engine will update approximately twenty-four hours from the time the clerks enter the information. This website is maintained by the Administrative Office of the Court for the State of Washington.

Do the government agencies that provide the information for this site and maintain this site:

- **Guarantee that the information is accurate or complete? NO**
- **Guarantee that the information is in its**

			Complaint & Mt To Set Trial Date	
34	01-11-2016	MOTION TO CONTINUE	Mt To Continue Hrg For Plntfs Mt & Dfndnts Dclr	
35	01-11-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
36	01-12-2016	CITATION ACTION	Citation 1:30 - Def's Mt To Continue Hearing	01-14-2016S3
37	01-14-2016	MOTION HEARING	Motion Hearing	
38	01-14-2016	NOTICE OF TRIAL DATE ACTION	Notice Of Trial Date Non-jury 9:30 - .5 Day Breach Of Contract	
39	01-21-2016	NOTICE OF TRIAL DATE ACTION	Notice Of Trial Date 9:30 - .5 Day Breach Of Contract	02-26-2016S1
40	01-25-2016	COMPLAINT	Amended Complaint For Breach Of Contract	
41	01-25-2016	MOTION	Mt To Issue Subpoena Duces Tecum Interrog & Shorten Time For Respons	
			Mt For Leave Of Court To Submit	
42	01-25-2016	CITATION ACTION	Citation 1:30-mt For Iss Of Subpoena Decus	01-28-2016S2
			Tecum &mt For Leave Of Court To	
			Submit Interrog& Short Time For Rsp	
43	01-26-2016	NOTICE	Def Nt Of Docs To Be Offered As Exhibits At Trial (er904)	
44	01-28-2016	MOTION HEARING	Motion Hearing	
45	02-08-2016	CITATION ACTION	Citation 9:30 - Entry Of Judgment & Order	02-26-2016S2
46	02-23-2016	NOTICE OF APPEARANCE	Notice Of Appearance	
47	02-23-2016	ANSWER	Answer To Amended Complaint	
48	02-23-2016	TRIAL BRIEF	Trial Brief	
49	02-25-2016	TRIAL BRIEF	Plaintiff's Trial Brief	
50	02-25-2016	OTHER	Other	
51	02-26-2016	MOTION HEARING	Motion Hearing	
52	02-26-2016	EXHIBIT LIST	Exhibit List	
53	02-26-2016	NOTICE OF TRIAL DATE ACTION	2nd Amended Notice Of Trial Date 2:30- Breach Of Contract	04-14-2016S5
54	03-22-2016	MOTION	Mt For Leave Of Court Amend Cmplnt	
55	03-22-2016	CITATION ACTION		04-14-2016S5

most current form?
NO

- **Guarantee the identity of any person whose name appears on these pages?**
  NO
- **Assume any liability resulting from the release or use of the information?**
  NO

			Citation 2:30 - Mt For Leave To Amend Cmpl	
56	04-11-2016	ANSWER	Answer To Proposed Amend Complaint	
57	04-14-2016	NON-JURY TRIAL APT	Non-jury Trial Actual Proceeding Time	
58	04-15-2016	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
59	04-20-2016	NOTICE OF TRIAL DATE ACTION	Notice Of Non Jury Trial Date 9:30 - Cont Of 04/14/16 Trial	04-29-2016S1
60	04-29-2016	BRIEF	Pocket Brief For Clarification Of Court Authority For Equity	
61	04-29-2016	MOTION	Mt For Relief Frm Decree Of Court	
62	04-29-2016	BRIEF	Pocket Brief	
63	04-29-2016	NON-JURY TRIAL APT	Non-jury Trial Actual Proceeding Time	
64	04-29-2016	EXHIBIT LIST	Exhibit List	
65	05-06-2016	NT OF DISCR. REVIEW TO CT OF APPEAL	Nt Of Discr. Review To Ct Of Appeal	
-	05-06-2016		Appeal Fee Recieved	
66	05-06-2016	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
67	05-16-2016	CITATION ACTION	Citation 1:30 - Entry Of Findings & Jdgmnt	05-26-2016S1
68	05-19-2016	MOTION	Motion For Supersedeas Bond	
69	05-23-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
70	05-23-2016	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
71	05-23-2016	OBJECTION / OPPOSITION	Obj To Proposed Jdgmnt & Order	
72	05-23-2016	OBJECTION / OPPOSITION	Obj To Proposed Fndngs Of Fact & Conclusions Of Law	
73	05-23-2016	OBJECTION / OPPOSITION	Obj To Mt For Supersedeas Bond	
74	05-23-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
75	05-23-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
76	05-26-2016	MOTION HEARING	Motion Hearing	
77	05-26-2016	FINDINGS OF FACT&CONCLUSIONS OF LAW	Findings Of Fact&conclusions Of Law	
78	05-31-2016	CITATION ACTION	Citation 1:30 - Entry Of Jdgmnt & Bond	06-02-2016S1
79	06-02-2016	MOTION HEARING	Motion Hearing	
80	06-02-2016	NOTICE OF INTENT TO WITHDRAW	Notice Of Intent To Withdraw	

81	06-02-2016	JUDGMENT	Judgment And Order	
82	06-02-2016	ORDER AUTHORIZING	Ord Set Supersedeas/cash Sec Bond	
83	06-02-2016	ORDER AUTHORIZING	Amendment To Decree Of Dissolution	
84	06-02-2016	OBJECTION / OPPOSITION	Objection To Entry Of Judgment/bond	
85	06-06-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit Of Service	
86	06-06-2016	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
87	06-15-2016	SUPERSEDEAS BOND	Notice Of Cash Supersedeas	
88	06-16-2016	MOTION	Mt To Stay Jdgmnt & Accept Supersedeas Bond	
-	06-16-2016	COMMENT ENTRY	Order To Stay * Denied *	
89	06-27-2016	PERFECTION NOTICE FROM CT OF APPLS	Perfection Notice From Ct Of Appls	
90	06-27-2016	MOTION	Mt To Stay Jdgmnt & Accept Supersedeas Bond	
91	06-27-2016	CITATION ACTION	Citation 1:30 - Dfndnt Mt To Stay Jdgmnt & Accept Supersedeas Bond	06-30-2016
-	06-29-2016	HEARING CANCELLED:DEF/RESP REQUEST	Hearing Cancelled:def/resp Request	
92	06-30-2016	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers	
93	06-30-2016	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Exhibits	
-	07-14-2016	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received	
94	07-15-2016	INDEX	Index To Clerks Papers	
95	07-15-2016	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
96	07-15-2016	INDEX	Index To Exhibits	
97	07-15-2016	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
98	08-09-2016	MOTION FOR ORDER TO SHOW CAUSE	Motion For Order To Show Cause	
99	08-09-2016	DECLARATION	Declaration Of Rick Shurtliff	
100	08-09-2016	CITATION ACTION	Citation 1:30 - Mt For Ord To Show Cause	08-25-2016S2
101	08-12-2016	OTHER	Supersedeas Bond Of Kim Bailey & Notary Acknowledgment	
102	08-12-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Aff Of Kim Bailey In Supp Of Super	
103	08-12-2016			

		SEALED CONFIDENTIAL RPTS CVR SHEET	Sealed Confidential Rpts Cvr Sheet	
104	08-12-2016	SEALED FINANCIAL DOCUMENT(S)	Sealed Financial Document(s)	
105	08-12-2016	TRANSMITTAL LETTER - COPY FILED	Transmitl Ltr-cpy Filed*super Bond	
106	08-15-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
107	08-22-2016	RESPONSE	Resp To Plntfs Mt For Show Cause	
108	08-22-2016	MOTION	Mt To Strike Plntfs Mt Show Cause	
109	08-22-2016	MOTION	Mt To Return Excess Ca Supersedeas	
110	08-22-2016	CITATION ACTION	Citation 1:30-mt To Strike Show Cause/return Excess Cash Supersedeas	08-25-2016S2
111	08-22-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
112	08-22-2016	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
113	08-25-2016	MOTION HEARING	Motion Hearing	
114	08-25-2016	ORDER ON CONTEMPT	Order On Contempt	
115	09-02-2016	AFFIDAVIT	Affidavit	
116	10-24-2016	DESIGNATION OF CLERK'S PAPERS	Supplemental Desig Of Clerks Papers	
117	10-24-2016	INDEX	Suppl Desig Index To Clerks Papers	
-	10-24-2016	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received	
118	10-24-2016	TRANSMITTAL LETTER - COPY FILED	Transmittal Ltr-cpy Filed*suppl	
119	10-27-2016	NOTICE	Nt Of Filing Verb Rpt Of Proceeding	

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANA GUARDADO
Respondent

v.

OTTO GUARDADO
Appellant

Skamania No. 14-2-00141-1
COA No. 48903-1-II

CERTIFICATE OF SERVICE

I Certify under penalty of perjury in accordance with the laws of the State of Washington that I sent to the WA Court of Appeals Div. II, by US Mail, postage paid, and served Respondent, through her attorney, Thomas Foley, by US Mail, postage paid, at 1111 Broadway St, Vancouver, WA 98660 on November 4, 2016 the following:

Appellant's Opening Brief
Trial Verbatim Report of Proceedings (4/14/16; 4/29/16)
Verbatim Report of Proceedings (8/27/15; 1/14/16; 1/28/16 (original and amended); 2/26/16; 5/26/16; 6/2/16)
Supp. Verbatim Report of Proceedings (2/26/16 ex parte; 8/25/16)

Dated November 4, 2016 at Vancouver, WA,

Otto Guardado
10007 NE 28th Ave
Vancouver WA 98686
360-713-2448